



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

Lisa Madigan  
ATTORNEY GENERAL

January 8, 2019

*Via electronic mail*  
Mr. John Kraft

RE: OMA Request for Review – 2018 PAC 56086

Dear Mr. Kraft:

The Office of the Attorney General, Public Access Bureau, has received the attached response to your Request for Review from the DuPage County Election Commission.

You may, but are not required, to reply in writing to the public body's attached response. If you choose to reply, you must submit your reply to this office within 7 business days of your receipt of this letter. 5 ILCS 120/3.5(c) (West 2016). Please send a copy of your reply to Mr. Conway as well.

If you have any questions about this matter, please contact me at the Chicago office address listed below.

Very truly yours,

A handwritten signature in black ink, appearing to read "Teresa Lim", is positioned above the printed name.

TERESA LIM  
Assistant Attorney General  
Public Access Bureau

Attachment

cc: *Via electronic mail*  
Mr. Sean Conway  
Attorney for DuPage County Election Commission  
Bond, Dickson & Conway  
400 South Knoll Street, Unit C

Mr. John Kraft  
January 8, 2019  
Page 2

Wheaton, Illinois 60187  
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400 S. Knoll Street, Unit C, Wheaton, Illinois 60187 P 630.681.1000 F 630.681.1020

January 3, 2019

**VIA E-MAIL TRANSMISSION**

Ms. Teresa Lim  
Assistant Attorney General  
Public Access Bureau  
Office of the Attorney General  
100 W. Randolph St.  
Chicago, Illinois 60601  
[tlim@atg.state.il.us](mailto:tlim@atg.state.il.us)

RE: OMA Request for Review – 2018 PAC 56086  
Our File No. 97-114

Dear Ms. Lim:

Please be advised that this Firm represents the DuPage County Election Commission (the "Election Commission") in connection with this matter. In this capacity, I have been directed to respond to the Public Access Counselor's ("PAC") request for a response to the complaint of Mr. John Kraft under the Open Meetings Act ("OMA") in connection with the Election Commission's public meeting dated December 12, 2018. Specifically, Mr. Kraft alleges that one of the Election Commission members, John Boske ("Member Boske"), attended the meeting by telephone for a reason that is not permitted under the OMA.

The PAC has requested that the Election Commission provide the PAC a copy of the December 12, 2018 meeting agenda, minutes and any Election Commission rules governing member attendance by means other than physical presence. The PAC has also requested that the Election Commission respond in writing to the allegations in Mr. Kraft's Request for Review.

**Records Requested**

Enclosed herewith is a copy of the Election Commission's December 12, 2018 meeting agenda and the Election Commission's rules governing member attendance by means other than physical presence. The Election Commission will provide the minutes of its December 12, 2018 meeting by supplement as the minutes have yet to be prepared due to the filing and adjudication of nine time sensitive Electoral Board matters. An audio recording of the December 12, 2018 meeting can be located at <http://dupage.iqm2.com/Citizens/Default.aspx>.

**The Telephone Participation of Member Boske at the December 12, 2018 Meeting was Proper under the OMA Due to his Out-of-State Attendance of a Family Matter**

Section 7 of the OMA provides:

If a quorum of the members of the public body is physically present as required by Section 2.01, a majority of the public body may allow a member of that body to attend the meeting by other means if the member is prevented from physically attending because of: (i) personal illness or disability; (ii) employment purposes or the business of the public body; or (iii) a family or other emergency. "Other means" is by video or audio conference.

5 ILCS 120/7.

A "family or other emergency" is not further defined in the OMA and has not been interpreted by any reported Illinois case. The OMA training portal maintained by the Illinois Attorney General's Office does not provide any guidance on the definition or contours of a "family or other emergency" <http://foia.ilattorneygeneral.net/Training.aspx>.

Here, Member Boske participated in the December 12, 2018 meeting via telephone due to an out-of-state family matter. Moreover, two of the three Members of the Election Commission were in physical attendance at the meeting and could have conducted all business on the agenda without the participation of Member Boske. However, due to the composition of the Election Commission, mandated by sections 6A-1 and 6-22 of the Election Code, Member Boske felt a unique obligation to participate in the meeting as he is the sole member on the Election Commission from the leading Democratic Party. 10 ILCS 5/6A-1; 10 ILCS 5/6-22 (requiring that two of such commissioners at least shall always be selected from the 2 leading political parties of the state, one from each of such parties). Member Boske believed that the OMA authorized his participation in the meeting by telephone. Additionally, all items voted on for final action received approval by the unanimous vote of all three members, two of whom were physically present.

Mr. Kraft requests that the PAC declare each and every final action item where Member Boske participated void and unenforceable. However, the OMA does not provide for this specific authority. *See generally, Ferris, Thompson & Zweig, Ltd. v. Esposito*, 2015 IL 117443, ¶ 16, 25 N.E.3d 637, 641 ("An administrative agency's powers are limited to those granted by the legislature and any action taken by an agency must be authorized specifically by statute" and "[w]hen an agency acts outside its specific statutory authority, it is said to have acted without 'jurisdiction'"). Section 3.5 specifically authorizes the PAC, upon concluding that a violation of this OMA has occurred, to issue "directives" to public bodies. 5 ILCS 120/3.5. Section 3.5 of the OMA does not provide the PAC specific authority to declare null and void final actions of public bodies unlike section 3 of the OMA, which expressly provides Illinois courts the specific authority to declare null and void final actions of public bodies but only those actions taken at a closed meeting in violation of the OMA. 5 ILCS 120/3; *see contra, Bd. of Educ. of Waukegan*

*Cnty. Unit Sch. Dist. 60 v. Illinois State Charter Sch. Comm'n*, 2018 IL App (1st) 162084, ¶ 128, 97 N.E.3d 85, 116. Moreover, section 3 of the OMA was enacted prior to section 3.5; therefore, it is presumed that if the legislature intended to vest the PAC with the authority to declare null and void final actions of public bodies, it would have expressly provided for that authority in section 3.5 of the OMA. *State v. Mikusch*, 138 Ill. 2d 242, 247-48, 562 N.E.2d 168, 170 (1990) ("It is presumed that the legislature, in enacting various statutes, acts rationally and with full knowledge of all previous enactments.").

Notwithstanding, the nullification of final actions, taken in open session, involving OMA irregularities, "is too extreme and not supported by the Open Meetings Act." *Chicago School Reform Bd. of Trustees v. Martin*, 309 Ill. App. 3d 924, 936, 723 N.E.2d 731, 740 (1st Dist. 1999); see also, *Williamson v. Doyle*, 112 Ill. App. 3d 293, 300, 445 N.E.2d 385, 390 (1st Dist. 1983) ("The statute permitting the court to declare the action void refers by its terms only to a 'closed session.'"); *Gerwin v. Livingston County Bd.*, 345 Ill. App. 3d 352, 358, 802 N.E.2d 410, 414 (4th Dist. 2003); *Board of Educ. School Dist. No. 67 v. Sikorski*, 214 Ill. App. 3d 945, 952, 574 N.E.2d 736, 741 (1st Dist. 1991). Significantly, this is true concerning telephonic participation irregularities. *People ex rel. Graf v. Vill. of Lake Bluff*, 321 Ill. App. 3d 897, 908, 748 N.E.2d 801, 811 (2d Dist. 2001), *rev'd on other grounds*, 206 Ill. 2d 541, 795 N.E.2d 281 (2003) ("Assuming *arguendo*, that telephonic participation in a meeting violates the Act in some way, plaintiffs fail to demonstrate why the extreme remedy of nullification is appropriate in the present case.").

Given the circumstances of this matter, such nullification would be far too extreme and inappropriate considering the underlying purpose of the OMA to ensure "that public bodies exist to aid in the conduct of the people's business and that the people have a right to be informed as to the conduct of their business." 5 ILCS 120/1. Mr. Kraft's grievance in this matter does not implicate a violation to the fundamental purpose of the OMA, as all final actions of the Election Commission at its December 12, 2018 meeting occurred in open view of the public on proper notice so as to preserve the public's right to know. *Id.*

Accordingly, the Election Commission requests that the PAC make a determination that this matter does not implicate an OMA violation.

Should you have any follow-up questions do not hesitate to contact me.

Very truly yours,

**DUPAGE COUNTY ELECTION COMMISSION**

By: /s/ Sean Conway  
Sean Conway, One of its Attorneys